No. 222.

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OCTOBER TERM, 1900.

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DAVID WELLS, THOMAS BALLANTYNE, CHARLES M. GILBERT, JOHN H. GILBERT, WILLIAM KEHOE, HENRY BLUN, DANIEL G. PURSE, ROBERT McINTYRE, MARY E. DOUGLASS, AND DENNIS O'CONNELL, PLAINTIFFS IN ERROR,

against

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH AND ROBERT J. WADE, CITY MARSHAL.

BRIEF FOR PLAINTIFFS IN ERROR.

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POPE BARROW,
Counsel for Plaintiffs in Error, Savannah, Georgia.

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IN THE

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THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH AND ROBERT J. WADE, CITY MARSHAL, DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

In May, 1790, the yearly expenses of the city government of the city of Savannah were estimated to be 1,250 pounds sterling, and the income of the city about 542 pounds sterling, a deficiency of 708 pounds sterling. (See Record, p. 26.)

At this time there was a large body of land on the east, south, and west of the city proper called the "Town com-

mon," the title to which was believed to be vested in the lot-owners of the town. The town council, after consulting with the lot-holders of the city, determined to lay off a certain portion of the East and West common into town lots and to dispose of them, with a view of relieving the inhabitants from burdensome assessments and for the purpose of defraying the necessary expenses of the current year, "*as well as establishing a fund for that purpose in future.*" (See Record, p. 26.) and passed an ordinance on Sept. 28

Eighty lots were laid off from the East common and forty lots from the West common, 120 lots in all, with squares, streets, and lanes, and the terms and conditions of disposing of these lots were, *first*, to value the lots at from 160 pounds sterling to 40 pounds sterling and to fix a ground rent on the same at the rate of five pounds per cent., and the purchaser could either pay down the valuation money or hold the purchase on a ground rent payable quarterly. *Second.* They were to be put up at public auction, beginning with No. 1 in each ward, and be disposed of as long as there were bidders. They were to be set up at the valuation fixed, and whatever sum of money should be bid in addition to the valuation money should be considered as increase money and be paid down in cash, and the highest bidder of increase money should be deemed the purchaser of the lot then offered. *Third.* The purchaser had the option either to pay the valuation money in cash and obtain a deed in fee-simple (see Record, p. 28) or retain the valuation money in their hands and the hands of their heirs and assigns forever on a ground rent at the rate of 5 per cent., payable in four equal quarterly payments into the city treasury (Record, p. 29).

The estate which the purchaser acquired in electing to

retain the valuation money in his hands was declared to amount to this:

"That the use and occupation of the premises should be forever secured to the purchaser and those claiming under him or her, on payment of the ground rent, but on failure therein for fifteen days after the same shall become due, the premises are to revert to the corporation who shall immediately possess the power of re-entry to be exercised by its proper officer in the manner prescribed, and on the exercise of the right of re-entry the lots to be absolutely revested in the corporation free from any sale or incumbrance thereon." (See Record, p. 29).

In further declaration of the nature of the estate in the holders of the ground-rent lots the notice of sale published by the commissioners appointed by the municipal corporation to superintend the sale of the lots contains the following announcement:

"The terms specified by the ordinance are as follows: The lots will be set up at the valuation fixed by council and whatever sum is bid above such valuation will be required in cash and the person being the highest bidder shall be deemed the purchaser. Purchasers are at liberty to take a *lease* to him or his or her heirs and assigns forever of the lot so purchased at a ground rent of 5 per cent. on the valuation, payable quarterly to the city treasurer, or to extinguish the *leasehold* title by paying at any time to the city treasurer the original valuation money and all arrears of rent of the lot and take a title in fee-simple to the premises" (Record, pp. 30 and 31).

"On failure to pay groun l rent quarterly, the city to have the right to re-enter on twenty days' notice to the person in possession, and in case of non-payment then the lot and improvements to revert to the city. Purchasers taking a lease-

hold estate will be required to give security for the rent" (Record, p. 30).

"*Other particulars will be declared on the day of the sale*" (Record, p. 31).

The form of the deed by which the city conveyed the right to the use and occupation of the ground-rent lot to the purchaser recited that the purchaser had made his election for the present of retaining the valuation money in his own hands and paying ground rent for the use and occupation of the lot, which ground rent at and after the rate mentioned in the ordinance will amount to $—— per year. The city, in consideration of the increase money and of the rent to be paid and the covenants and agreements to be performed, bargained and sold the said lot, with the rights, members, and appurtenances thereof (Record, p. 19).

To have and to hold the said lot, with all and singular the *advantages* thereunto belonging, to the purchaser, his executors, administrators, and assigns forever, upon the express condition that the purchaser, his executors, administrators, and assigns, do and shall yearly and every year during such time as the valuation money shall remain unpaid by four quarterly payments pay into the city treasury the sum of $—— as ground rent for the use and occupation of the lot, and in case of failure to pay the rent for 20 days after any of the quarterly payments shall become due the lot shall revert to the city, who shall have the power of re-entry, to be exercised as therein prescribed (Record, p. 20).

And the true intent and meaning of the conveyance and of the parties is declared to be that on payment of the ground rent as therein directed the grantee, his heirs, executors,

and administrators and assigns, shall from time to time and at all times peaceably and quietly have, hold, use, occupy, and possess and enjoy the said lot and premises, and receive and take the rents, issues, and profits thereof and of every part thereof to his and their own use absolutely without the let, suit, eviction, or denial of the said corporation or of any person whatsoever acting under them or by virtue of their authority, subject only to such assessments and burdens as shall be common with other lot-holders in the city; and it was agreed that at any future time it should be in the power of the purchaser, his heirs, executors, administrators, or assigns, to pay in the valuation money with what interest may be due up to that time to the city treasury, and in that case the payment should be acknowledged under the seal of the city, signed by the mayor and a majority of the aldermen for the time being, attested by the clerk and endorsed on the conveyance, which should then and thenceforth vest an absolute estate in fee-simple to the lot in the purchaser, his heirs or assigns (Record, pp. 20 and 21).

It is admitted that all ordinances subsequently passed for the sale of lots laid out from the common conform to the first ordinance (Record, p. 31).

And that the conveyances and the purchases have always conformed to the deeds originally given (Record, p. 33).

The conveyance is referred to as the "lease" of the lot and the purchasers as the "lessees" (Record, p. 35).

The lots are referred to as lots "held under lease" from the corporation. (See Record, pp. 35, 42, 49, 50.)

Doubts having arisen as to the power of the municipal corporation to dispose of the town common, the contract made by the municipal corporation in making sale of these

lots was confirmed and validated by the legislature of the State by an act of the General Assembly assented to December 21, 1823, to confirm certain conveyances of the town common of Savannah made by the mayor and aldermen (Record, p. 31).

The language of the validating act is as follows:

"The mayor and aldermen of the city of Savannah, having been prohibited by an act passed on December 1, 1760, from alienating or granting away for any purpose whatsoever than by an act of the General Assembly the common appertaining to said town, and it being represented to the legislature that the mayor and aldermen, to the great advantages of the lot-holders and with much profit to the treasury of the city, had at different times granted and conveyed certain parts or lots of said common, and justice requiring that the agreements made by the corporation with the purchasers be confirmed:

"*Be it enacted, etc.*, That all and singular the conveyances heretofore made of the town common, whether in fee-simple or otherwise, shall be, and they are hereby, declared to be legalized, confirmed, and made valid to all intents and purposes, according to the covenants, limitations, and agreements of the same."

And again, in 1825, the legislature of the State conferred upon the said mayor and aldermen power to sell and dispose of any part of the property, domain, land, or lots to said corporation belonging or appertaining by lease for years or fee-simple as to the said mayor and aldermen or a majority of them shall seem meet and proper.

Assented to December 24, 1825 (Record, p. 31).

In the statement made by the municipal authorities and spread upon its minutes these "city lots" are set out and

inventoried as real estate belonging to the city of Savannah (Record, pp. 40 and 41).

And the official reports of the mayor, made annually, shows that the municipal corporation claimed to be the owner of these ground-rent lots as part of the "*city domain*" (Record, p. 42).

Under the contract of the city and the holder of these city lots or "leased lots" all that the city required from the holder was the payment of the ground rent to entitle him to the peaceable and quiet use, occupation, enjoyment, and possession of the lot (Record, p. 20).

No tax or assessment was levied by the municipal authorities on these lots, nor was any such payment provided for. No re-entry was provided for except on failure to pay the rent; but the lessee was to bear any assessment or burden that might be assessed against a lot-owner (Record, p. 51).

As long as the title remained in the city the tenant could claim that all assessments and burdens that might be made upon the lot should be assumed and be borne by the owner; hence, in order that all taxes that might be assessed by the State and all assessments for improvements should be paid by the lessee instead of the lessor, the stipulation was incorporated in the conveyance that the lessee should hold the same subject "only to such assessments and burdens as shall be common with other lot-holders."

The city ceased to dispose of its domain upon the ground-rent plan in the year A. D. 1872. Down to this time no attempt had ever been made to tax these lots. After the city had ceased to sell lots under the old ground-rent plan the taxation of these leased lots by the city began to be agitated (Record, pp. 51 and 52).

It is admitted in the record (p. 51) that no taxes were ever assessed by the city on the "ground-rent lots" or "leased lots" until under the ordinance that was passed May 29, 1878, and not under that ordinance until the year 1890 (Record, p. 51).

And that no taxes were assessed or levied by the city upon these "leased lots" from the year 1791 to the year 1890, the ordinance of May 29, 1878, being put in force in 1890 (Record, p. 51).

The first taxation by the mayor and aldermen of the city of Savannah on real estate was levied under authority of an act of the legislature assented to December 2, 1805 (Record, p. 48).

The first ordinance was adopted April 7, 1806, and levied a tax as follows:

"On all houses, buildings, lots and wards within the city as well unimproved as improved, and including all lots held by lease from the corporation, twenty-five cents on every one hundred dollars" (Record, p. 49).

At the council meeting, May 19, 1806, the tax ordinance was recommitted to a select committee, and the discussion of the ordinance continued until November 24, 1806, when it was finally passed by an amending ordinance:

"*Be it ordained, etc.*, That so much of the first section of the aforesaid ordinance as imposes a tax on lots held by lease from the corporation be and the same is hereby repealed" (Record, p. 50).

And from that time every tax ordinance to raise revenue for the city up to and including the ordinance of January 22, 1857, "excepted lots held by lease from the corporation" (Record, p. 50).

The tax ordinance of 1857 defined "real property" to include land itself and all buildings and other fixtures erected upon land, whether the land upon which such buildings and other fixtures may be erected be or be not itself subject to taxation. Section 4 of the same ordinance specifically exempted "each lot of land held at the time of the passage of this ordinance upon the payment of ground rent to the mayor and aldermen of the 'class commonly called city lots'" (Record, p. 50).

In one form or another every tax ordinance admitted the exemption of leased lots or city lots from city taxation. So also in the annual reports made by the municipal authorities in compiling the sources of revenue it is from time to time announced "that 'city lots' or lots under lease not being liable to city taxes are not included in the above comparison." And in the volume of city ordinances published in the year 1858 by the corporation, on page 538, is the following statement: "City lots or lots under lease not being liable to city taxation are not included in the above comparison" (Record, p. 50).

It further appears from the testimony of the oldest inhabitants in life at the time of the trial of the cause that at all sales of city lots the announcement was publicly made by the city marshal, the city official conducting the sale, which was also superintended by a committee of aldermen representing the council, that ground-rent lots were not subject to city taxes. The announcement was always made that lots thus sold would be free from taxation by the city. These terms were publicly and openly stated by the marshal and entered into the contract of sale. There is no evidence to contradict this element of the contract, and the announce-

ment is in conformity with the written notice already cited, in which the commissioners for the sale of these lots announce that other particulars will be declared at the sale (Record, pp. 58, 60, 61, 63).

Among other facts in the record of recognition by the municipal authorities that the ground-rent lots were a part of the city domain, producing a revenue to the city from rents alone, and not subject to taxation by the city, are the official statements made in the annual reports of the mayor for the years 1858, 1860, 1861, 1862, and 1863 (p. 50). In the annual report of the mayor for the year A. D. 1871 occurs the following statement:

"It is not known to the foreign public that a very large part of the real estate in the city consists of lots sold on condition of the payment of ground rents and are therefore not the subject of taxation" (Record, p. 51).

In the estimates of resources in the report of the finance committee made in the year 1841, when there was great need of funds, after most careful investigation, no suggestion is made to tax ground-rent lots (Record, pp. 52, 53, and 54; also p. 58).

In the report of Wm. Hunter, chairman of the finance committee, in 1872, which was adopted in council, it is admitted that—

"The reason why city lots are not taxed is that the city is understood to have bound itself not to tax them. It is of no moment that the stipulation does not appear in the deeds, the ordinances contain the real terms of the contract and control the deeds wherever the latter depart from or conflict with them. And as the city has never taxed such lots it is

difficult to resist the conclusion that such was the design when the ordinance of 1790 was framed" (Record, p. 56).

In the face of all these facts, it would seem that the municipal corporation is estopped from denying the relation of landlord and tenant and the existence of the contract not to levy or assess any tax on these lots.

The deposition of George W. Wylly, a resident of the city for fifty-five years, shows that he was chairman of the committee on public sales and city lots most of the time; that he served as alderman; that as such chairman he was present at the sales of these lots. The announcements of the terms of sales were made by the city marshal, who conducted the sales by the direction of the committee. He would usually read the advertisement and then the particular lot offered, stating the valuation placed on it by the city; then the option that the purchaser had, to buy either the fee-simple or on the ground-rent plan. If the fee, the entire purchase-money would be payable on execution of title. If on the ground-rent plan, 20 per cent. of the bid would be paid in cash and an annual ground rent of 6 or 7 per cent., according to the ordinance, on the balance of purchase-money, payable quarterly, and would also announce that so long as the lots were held under ground-rent plan they would be free from city taxes. These announcements were made under the authority of the committee; and often when the bidding would lag the marshal would remind the bystanders that there was only 20 per cent. cash payment required, and that there was no city taxes, but only the annual ground rent (Record, pp. 57, 58).

This witness further testified:

"There never was a question during the period of my entire service as alderman as to the meaning of the deed under which the ground-rent lots were conveyed by the city. The city had the power to re-enter for non-payment of rent and the holder the right to hold under a perpetual lease as long as he paid the ground rent when due. The city had no power to tax the ground-rent lots" (Record, p. 58).

The statement that the city marshal made the announcement at the sale of these lots that they would be free from city taxes is testified to by several citizens and is not denied by any witness (Record, pp. 60, 61, and 62).

The exemptions of the ground-rent lots from city taxation enabled the corporation to obtain better prices and consequently larger rents, and the benefit to the city in obtaining this perpetual income, which was larger than the revenue from taxation, which is shown in the tables on pages 44 and 45, the report of the city marshal on pages 47 and 48, and the testimony of the witnesses (Record, pp. 58, 59, 60, 61, 62, and 63).

In the year 1850 the municipal corporation of Savannah purchased a large body of land contiguous to the city known as Springfield plantation and divided the same into lots and proceeded to dispose of the same in the same manner as it disposed of the town common, except that the term of time for which the purchaser could retain the balance of purchase-money was limited to 24 years. The purchaser had the same option as to paying up the valuation money and obtaining a fee-simple title and the same covenant of quiet enenjoyment. There was the same forfeiture of possession and use on default of payment of the ground rent and the same right of re-entry, to be exercised in the same manner by the

municipal corporation; and the fee was conveyed by the same endorsement of payment by the mayor and aldermen, under the seal of the city, attested by the clerk, on the conveyance.

The deed conveying the Springfield lots is identical in form with the deeds conveying the town-common lots where the purchaser elected to retain the valuation money, except that the estate continues in the Springfield lots for 24 years, while the estate continues in the town lots so long as the purchaser or his assigns continues to pay the ground rent therein reserved to be paid.

Both conveyances are referred to in the ordinances as "leases," and, while the Springfield lots have been incorporated in the city corporate limits since February, 1854, the city has never attempted to collect from the lessees any other redendum than the rent reserved, nor has any tax been levied on the lots as the property of the lessees (Record, pp. 32, 33, and 19, 20, 21, and 22).

The report of the committee of the city council of Savannah on finance reported on page 52 of the Record, marginal pages 71, 72, was presented to the court and jury to show the depleted condition of the city treasury, the heavy liabilities due by the city, and the sources of income, and in the great strait in which the finances of the city then were in the search for new sources of taxation the ground-rent lots were not deemed subject to taxation and no attempt made to violate the obligation of the contract then universally admitted not to tax this species of property.

The lots were the property of the city, from which was derived a fixed rent, both under the covenant of quiet enjoyment and the terms of the sale as announced by the city

marshal and the positive admissions in the ordinances specifically exempting from city taxation these lots.

The owners thereof refused to submit to an ordinance subjecting them to city taxes adopted by the city after the sale of lots under the ground-rent plan had been permanently discontinued and the rights of the holders had been established for over seventy years.

When this ordinance to tax the city lots was sought to be enforced by the mayor and aldermen of the city in the year 1890 the plaintiffs in error brought their bill in equity to enjoin the levy of such tax, alleging the facts showing the contract and agreement not to tax and claiming the protection of the great constitutional inhibition against the violation of the contract. Discovery was expressly waived of the defendant, so that all defensive or responsive allegations were only pleadings and not evidence under the laws of Georgia. The defendant in its answer admitted that the petitioners or plaintiffs in error were the holders of lots in the city of Savannah commonly known as ground-rent lots or city lots, and that the ordinances and deeds were of the character described in the bill in equity and exhibited a copy of the form of the deeds, both for the city leased lots and the Springfield leased lots. At the trial of the cause the plaintiffs submitted the evidence admitted and exhibited in the answer and the facts and documents reported in the record. The defendant offered no evidence and moved for a nonsuit. The plaintiffs submitted the legal principles that are reiterated in the specifications of error set forth in this brief. After argument had, the court granted the motion for a nonsuit and dismissed the petition.

Thereupon the plaintiffs in error brought this case by

writ of error to the supreme court of the State of Georgia at the October term, 1898, of said court.

On March 17, 1899, the supreme court of Georgia rendered its decision, affirming the judgment of the court below.

To this judgment of the supreme court of Georgia a writ of error was sued out from this honorable court to the supreme court of Georgia on the 8th day of February, A. D. 1900.

SPECIFICATION OF ERRORS.

We assert that the supreme court of Georgia erred—

First. In deciding that by the contract disposing of the common to the lot-holders under the ordinance of September 28, 1790, the mayor and aldermen parted with all title to those lots bid in by those who elected to retain the purchase-money and pay ground rent.

Second. In deciding that under the contracts made with those who elected to pay ground rent the mayor and aldermen could lawfully tax said land as the property of the lessees.

Third. In deciding that the reservation of rents and the covenant of quiet enjoyment in the ordinances and contracts, the notices of sale, reports of the city officials, receipts of rents, assertion of title and ownership and conveyances set out in the record did not estop the mayor and aldermen to deny that the interest held by the lot-holders was a mere leasehold.

Fourth. In deciding that those who took lots under the ordinance of September 28, 1790, upon the ground-rent plan got anything more than the right to the use and occupation of the premises so long as the rent was paid and for 15 days after failure to pay an installment of rent when due.

Fifth. In deciding that the mayor and aldermen, after having covenanted that the lot-holders under the ground-rent plan should have quiet enjoyment of the premises, with all the advantages thereof, without let, suit, eviction, or denial, so long as the stipulated rent was paid, could nevertheless impose an additional annual burden, under the guise of a tax, as a condition to the quiet enjoyment of the premises.

Sixth. In deciding that the relation between the mayor and aldermen, of the one part, and the holders of ground-rent lots, of the other part, was not that of landlord and tenant.

Seventh. In affirming the judgment of nonsuit, thereby denying to the plaintiff the right of trial by jury of the issues of fact.

Eighth. The judgment of the supreme court of Georgia affirming the judgment of the superior court of Chatham county, Georgia, is violative of that provision of the Constitution of the United States which prohibits any action by a State or its authority which impairs the obligation of a contract.

Ninth. In deciding that the ordinances, conveyances, notices, and reports did not constitute a contract between the mayor and aldermen and the holders of the ground-rent lots exempting said lots from taxation.

ARGUMENT.

The determination of the question whether the ground-rent lots in the city of Savannah are subject to taxation by the city, in addition to the ground rent payable on the same to the city, depends upon the contract under which the city originally disposed of the lots and the holders obtained possession, acted upon by the city and lot-holder for nearly one hundred years.

The ordinance and the contract are to be construed and interpreted not according to the present powers of the city as restricted by the constitution of 1877, but according to the practical interpretation of the parties themselves, both at the time of the passage of the ordinance and of the execution of the contract, and continuously since that time, and the law as it existed at the time the contract was made. If the ordinance and contract has received a settled construction that has been acted on by both parties for a long period of time, and rights had been acquired under such settled construction, it is not competent for the present city council to change this construction and assert rights and powers in direct antagonism to such settled interpretations, impairing the obligation of the contract and imposing additional burdens and charges on the holders of the ground-rent lots not contemplated nor collectible under the settled interpretation of the contract and ordinance.

What was the settled construction and interpretation of the ordinance of September 28, 1790, and of the contract made thereunder in 1791 and subsequently?

The principle of contemporaneous and practical construction is expressed in some of the oldest maxims of the law.

"*Contemporanea expositio est fortissima in lege.*" "*Optima est legis interpres consuetudo.*" "*A communi observantia non est recedendum.*"

Long and continued usage furnish contemporaneous construction, which must prevail over the mere technical import of the words.

Rogers *vs.* Goodwin, 2 Mass., 475.
Rumsey *vs.* People, 19 N. Y., 41–50, 6th head-note.
Cronise *vs.* Cronise, 54 Pa. St., 255.
People *vs.* Maynard, 15 Mich., 463.
Scanlon *vs.* Childs, 33 Mo., 663.
Johnson *vs.* Joliet & Chicago R. R., 23 Ill., 202.
Weems, trustee, *vs.* Coker, 70 Ga., 749.
Harvard College *vs.* Boston, 104 Mass., 477–488.
Hardy *vs.* Waltham, 7 Pick., 110.
Edwards' Lessee *vs.* Darby, 12 Wheat., 206, 210.
U. S. *vs.* Moore, 95 U. S., 763.
U. S. *vs.* Johnston, 124 U. S., 253.
Solomon *vs.* Cartersville, 41 Ga., 157.

General and long-continued usage is not without its importance, and may be resorted to in aid of a proper construction of a statute or charter.

1 Dillon Municipal Corporations, sec. 93 and note.

The holders of ground-rent lots declined to pay the tax on the lots, denied the right of the city to tax the lots, resting their claim of exemption upon the following general grounds:

First. The fee to the lots is in the city, and the holders in their relation to the city were tenants under a perpetual assignable lease, on which only rent is due and payable, and the city could not tax its own property and could not increase the rent reserved by adding an additional per cent. under the name of taxes.

Second. That under the contract and conveyance from the city to the holder and his assigns the city covenanted that the holder should peaceably and quietly have, hold, use, occupy, and enjoy the lot and premises and receive and take the rents and profits thereof to his use absolutely, *without let, suit, trouble, eviction, or denial of the corporation* or any person whatsoever acting under it or by virtue of its authority, *on the payment of the said ground rent* (reserved in the conveyance) at the times and after the manner directed, and there was no reservation of any other charge, rent, or tax to the said city other than the ground rent in the agreement reserved (Record, pp. 20 and 29).

Third. That the assessments and burdens to which the holder was subject were only such as were common to other lot-holders in the city, and referred to such assessments and burdens that would have been chargeable to the city as the owner, and which were thus assumed by the holder as tenant (Record, p. 20).

Fourth. That the municipality from the time of the date of the first contracts of renting continuously until the passage of the ordinance of May 26, 1878, construed the contract as exempting the city lots from taxation so long as they con-

tinued subject to ground rent, and such construction of the contract was acted on by the city and the lot-holders and their assigns (Record, pp. 50, 51, and 56).

Fifth. That the city, in accordance with the universal interpretation of the original ordinance and deed, caused public notice to be given when these lots were exposed at public sale by the city marshal that the same would not be subject to city taxes so long as the lots were held under ground rent, and the same were purchased on the leasehold plan with such notice, and the present holders purchased the same with knowledge of and influenced by said notice, and that the city is bound by the said contract and cannot by any subsequent ordinance interfere with the obligation of the contract (Record, pp. 57 and 60).

Sixth. That the city having, in the most solemn and public manner, declared that the city lots were not subject to taxation by the city, and the recent lot-holders and their vendors having purchased the same and paid valuable consideration therefor on account of and influenced by such notice, the said city is estopped from denying that the said contract with the purchasers of the leasehold interest does exempt said lots from city taxes and only reserved a certain rent to be paid, and is estopped from levying any city taxes on said lots so long as they are held under ground rent.

THE CITY RETAINED THE FEE IN THE LOTS.

The minutes of council show that the lots were called indiscriminately "city lots," "leased lots," or "lots held under lease."

The ordinances, the deed, the public notice of sale, and

the announcement made at the sale together constitute a contract between the city and the purchaser.

The ordinance provided that a certain portion of the east and west common should be laid off into 120 lots; that the lots should be valued from one hundred and sixty to forty pounds sterling and sold and disposed of, the ground rent of the same to be after the rate of five pounds per annum on every one hundred pounds of value, the purchaser to pay down the purchase-money or else to hold his purchase on *ground rent payable quarterly*. (See Record, pp. 28, 29, and 30.)

From the above and from the declaration of the city that the disposing of the common was for the purpose of defraying the necessary expenses of the current year, "as well as establishing *a fund* for the purpose in the future," it clearly appears that the city contemplated disposing of these lots at a fixed ground rent because it fixed the amount of the ground rent in advance.

Secondly. Because it reserved no right to compel a sale of the entire interest in the lot. This was to be in the option of the purchaser alone.

Thirdly. Because it desired to establish a fund for the future to meet current expenses.

The conveyance which was executed by the city to the purchaser at such sale does not conflict with the ordinance; the ordinance declared that the estate of the purchaser who did not exercise the option to pay the purchase-money and take an absolute estate in fee-simple should amount to this:

"That the *use and occupation* of the premises should be forever secured to the purchaser and those claiming under him or her on payment of the ground rent," and on failure to pay the ground rent for fifteen days after it became due the premises to revert to the corporation and it to have the power of re-entry (Record, p. 29).

The deed exhibited to the answer, which is the form originally adopted and which has always been used in consideration of the payment of the increase money and of the rent to be paid and the covenant and agreement to be performed, conveys the lot, "to have and to hold, with all and singular the advantages thereof," not the remainders and reversions, to the purchaser, "his executors, administrators, and assigns," not to his heirs, and the conveyance was before the act of 1821, "on the expressed condition that the holder, his executors, administrators, or assigns shall yearly * * * pay the sum of —— dollars as *ground rent for the use and occupation of said lot*" (Record, pp. 19 and 20).

It is further "declared to be the true intent and meaning" of the instrument and of the parties to the same that on the payment of the *ground rent* at the times, etc., in the instrument directed, the purchaser, his heirs, executors, administrators, and assigns, shall from time to time," etc., peaceably and quietly have, hold, use, occupy, possess, and enjoy the lot and premises and receive and take the rents, issues, and profits, etc., to his and their own use absolutely without let, suit, trouble, eviction, or denial of the corporation or of any person whatsoever acting under them."

These are all terms familiar to the conveyancer and to be found in every well-drawn lease; and the terms in said conveyance above quoted are identical with the terms used in

the conveyance by the city to the purchaser of lots belonging to the city, known as "Springfield Plantation lots," a copy of which instrument is also exhibited to the defendant's answer (Record, p. 21).

We ask a comparison of these deeds, as by this means the intent of the corporation is made the more conspicuously clear. The "Springfield Plantation lots" were sold at public outcry to the highest bidder under an ordinance passed January 16, 1851. This ordinance was passed at a time when ground-rent lots were not considered subject to taxation by the city and while the city claimed to be the owner. This ordinance, like that of September 28, 1790, provided for laying off into lots a part of the city domain and disposing of the same. The lots were first valued, then put up for sale to the highest bidder, who is by the ordinance declared to be "*the purchaser of the lot.*" He is required to pay 20 per cent. of the aggregate of the increase money bid at the sale and the value fixed on the lot, and had the option to retain 80 per cent. of the purchase-money and to take a deed for a 24-year lease or estate, paying 7 per cent. on the amount of residue, in quarterly payments, by way of ground rent, with a further option to pay in the residue and obtain a fee-simple title at the expiration of 24 years (Record, p. 32).

The deed made to the "Springfield Plantation lots" is an "*indenture.*" The recitals in the first and second preambles are identical with those in the ground-rent deed, except the words "Springfield plantation" are substituted for the word "common" (Record, pp. 21, 22).

The third preamble differs, first, in limiting the time in which the ground rent is to be paid to the period of twenty-four years; second, in referring to the ground rent as interest

per annum "by way of rent;" and, third, in stating the option to pay up the residue of the purchase-money in twenty-four years and thereupon receiving a deed in fee-simple.

The words of conveyance are, "Demise set (let) and to farm-let," instead of "bargain and sell," but the conveyance is to the purchaser, his *heirs*, executors, administrators, and assigns. The habendum is to the purchaser, his executors and administrators, on *condition* that he pay yearly and every year the interest on the residue *by way of ground rent*, and in case of failure to pay the ground rent for twenty days or to pay the purchase-money at the end of twenty-four years the lot and premises *revert* to the corporation, and the right of re-entry and manner of re-entry are identical with the provisions of the ground-rent deed of conveyance; and all other covenants and conditions are the same, with only the insertion of "twenty-four years" instead of "at all times hereafter." It is "declared to be the true intent and meaning of the conveyance" that on the payment of the interest by way of ground rent at the time and after the manner therein directed "the purchaser, his *heirs*, executors, administrators, or assigns, shall and may from time to time and at all times during the continuance of this lease peaceably and quietly have, hold, use, occupy, possess, and enjoy the lot and premises and receive and take the rents, issues, and profits thereof to his and their own use without the let, suit, trouble, eviction, or denial of the said corporation or of any person whatsoever acting under them or by virtue of their authority." This is the precise covenant for quiet enjoyment that is found in the conveyance of the ground-rent lot.

Without going further into detail, the comparison shows

that the same general plan and intent actuated the corporation in disposing of the town common and the "Springfield Plantation," viz., to divide the property into lots, to put a fixed value on them, to put them up at public outcry to the highest bidder, who shall pay in the increase money and a fixed ground rent equal to a given per cent. on the valuation money, the purchaser to have the use and occupation, without let, suit, or eviction from the city, so long as the annual ground rent shall be paid, in the one case perpetually and in the other for twenty-four years, with the option in each case to secure a fee-simple absolute title by paying the valuation money in the one case at any time, and in the other within twenty-four years. The use and occupation and the rights and privileges of the purchaser are the same in each conveyance—they are those of a tenant having an assignable lease. The fee is retained by the city and is not conveyed until the purchase-money is paid; the tenant in the one case has a perpetual lease and in the other a term of twenty-four years. We shall see presently that a lease may be *in perpetuo;* that a perpetual lease is not invalid, but is recognized as a legal estate in Georgia.

In the notice of sale of lots, published by the commissioners appointed to sell the same, in the Georgia *Gazette* of June 13, 1799, it is stated that terms specified by the ordinance are as follows:

"The lots will be set up at the valuation fixed by council, and whatever sum is bid above said valuation will be required in cash, and the person being the highest bidder shall be deemed the purchaser; purchasers are at liberty to take a lease to him or her or his or her heirs and assigns forever of the lots so purchased at the ground rent of five per cent. on

the valuation, payable quarterly to the city treasurer, or to extinguish the leasehold title by paying at any time to the city treasurer the original valuation money and all arrears of rent for the lot and take a title in fee-simple to the premises. * * * Purchasers taking a leasehold estate will be required to give security in four times the annual ground rent for the due payment of the ground rent quarterly" (Record, p. 30).

Also the ordinance of February 27, 1851, authorizing any person holding a lot in the city of Savannah as tenant in common with another under ordinary city deed may pay one-half the balance of purchase-money due on the same and receive a deed in fee for one-half of the lot. "Any *lessee* of a city lot may on application to council divide said lot into two parts and receive separate leases for the same, and the party shall severally pay for the deeds issued" (Record, p. 34).

In the ordinance adding twenty feet to lots on Gaston street and in the form of the deed for the additional twenty feet it is provided that "the additional sum of $— as ground rent for the use and occupation of the same at the same time and on the same terms as in the original *lease* of the original lot" (Record, p. 35).

In the form of the deed for subdivision of city lots under the ordinance of February 27, 1851, set out on page 35 of the Record in this case, the property is conveyed to the grantee, "to have and to hold the same unto the said grantee forever upon the terms, covenants, and conditions mentioned and expressed in the original lease of said lot unto the former grantee and of record in the clerk of council's office; which said lease unto the original grantee is to be taken, held, and

considered as part and parcel of this lease and applying in the same manner as therein contained," etc.

The records of the city of Savannah contain at different times "reports of real property belonging to the city," and in the statement of the resources of the city of Savannah in the mayor's report, under the head of "the city domain," these city lots are set down as the property of the city as so many lots in a number of wards *under lease*. (See Record, pp. 40, 41, 42).

The form of the original transfers of these lots entered on the "registry of city lots in the treasurer's office" shows that they were transferred and assigned as leasehold property rather than as estates in fee (Record, p. 37).

No estate *in fee*, either conditional or otherwise, passed to the purchaser who paid rent, for the ordinance providing for the disposal of the lots laid out from the town common gave to the purchaser the option to pay down the valuation money or to hold his purchase under ground rent, and the deed states expressly "that the purchaser has made his election *for the present* of retaining the valuation money in his own hands and paying a *ground rent* for the *use* and *occupation*." So that it distinctly appears that the purchaser elected not to take a title in fee to the land, but to obtain the use and occupation on payment of a ground rent (Record, p. 19).

The conveyance does not create a fee conditional, because made at a time when the word "heirs" was necessary to a deed to convey a fee. The *habendum* is to the purchaser, his executors, administrators and assigns, upon the express condition that he and they do and shall, yearly and during such time as the valuation money shall remain unpaid, pay

into the city treasury $— dollars as ground rent, for the use and occupation of the lot. * * * And it is further "declared to be the true intent and meaning of the conveyance and of all the parties to the same that on 'payment of said ground rent at the times and after the manner therein before' directed, the purchaser, his heirs, executors, administrators and assigns shall and may from time to time and at all times hereafter peaceably and quietly *have, hold, use, occupy, possess and enjoy* the said lot and premises and take the rents, etc., to his own use absolutely without let, suit, trouble, eviction or denial of the corporation or of any one acting by virtue of its authority" (Record, p. 20).

A lease does not require any set form of expression. No particular form of words is necessary to constitute a lease.

Taylor's Landlord and Tenant, sec. 159.

Boone on Real Property, sec. 90 (8).

Any expression which shows an intention on the part of the lessor to divest himself of the possession in favor of the lessee and a corresponding intention of the lessee to come into the possession of the premises for a determinate period is sufficient.

Taylor's Landlord and Tenant, sec. 159.

Martindale on Conveyancing, sec. 326, p. 273.

A contract by which one is to pay an annual rent of 6 per cent. on the cost of a building with the right of becoming owner on paying the price is a lease. Its accidental provisions do not change its character.

Munic. No. 1 *vs.* New Orleans, La. Ann., vol. 5, p. 761.

Guilbert *vs.* Post, 28 Ohio, p. 276.

The use and possession of the lot passes from the lessor to the lessee for a determinate period, "during such time as the valuation money shall remain unpaid." *Id certum est, quod certun reddi potest.* The determinate period is "during the time the valuation money remains unpaid (Record, p. 20).

The instrument provides that when the valuation money shall be paid the lessee's estate shall be enlarged to a fee (Record, p. 20).

The fee, by the express terms of the conveyance, remains in the corporation until the valuation money shall be paid.

As has already been pointed out, the estate and conditions and covenants in the two instruments exhibited to the answer, the conveyance of the ground-rent lots and of the Springfield Plantation lots, are identical, save that one continues in force during such time as the valuation money remains unpaid and the other for 24 years.

The latter is admitted to be a lease; the former must also be so. That the time may continue *in perpetuo* does not defeat the intention to create a lease nor enlarge the estate to a fee, especially when the fee by the express terms of the conveyance, by the election of the purchaser, remains in the lessor or vendor and remains in it as long as the valuation money remains unpaid.

A lease may be made to continue so long as the lessee shall pay rent and perform its covenants.

Gould *vs.* Bugbee, 6 Gray, 371.

Worcester *vs.* Great Falls Mfg. Co., 41 N. H., 18–22.

Taylor's Landlord and Tenant, sec. 72.

Boone on Real Property, sec. 97.

Sadlier *vs.* Biggs, 27 Eng. L. and Eq., p. 74.

The conveyance expressly reserves the fee in the city until the valuation money shall be paid. It expressly conveys to the holder only the "use and occupation." As has already been shown, the estate conveyed and the covenants and conditions contained in the conveyance comport only with a perpetual lease and not an estate in fee (Record, p. 19).

In Folks *vs.* Huntley, 7 Wend., 210, the conveyance is the use of water in a creek with so much of the bank as may be necessary, etc., for such term of time and upon *the express condition*—that is, he, the said Huntley, his heirs, executors, and administrators, shall pay or cause to be paid to the grantor and his heirs and assigns annually and every year the sum of $—— and perform certain covenants. This instrument was declared to be a lease and the term a perpetual one.

The instrument made by the corporation to the purchaser conveys the lot to the party and his executors, administrators, and assigns on *this express condition*, that the said (party), his executors, administrators, and assigns, do and shall yearly and every year during the time, etc., pay or cause to be paid into the city treasury, etc., the sum of $—— as ground rent for the use and occupation of the said lot.

Are not these cases on "all fours" with each other? And if the estate in the Folks-Huntley case was a perpetual lease, is not the ground rent a similar estate? No greater interest is conveyed in the one than in the other. The estate ceases on breach of the condition and continues as long as the ground rent is paid.

The supreme court of Georgia, in the case of Atkinson *vs.* Orr, in 83 Ga., p. 34, have approved the decision of Folks *vs.* Huntley, and declares that a writing by which the grantor

stipulates with the grantee that he and his heirs and assigns shall retain possession as long as the rents are paid is a perpetual lease.

It seems, therefore, to be undoubtedly true that parties may contract so as to create a perpetual lease dependent on the prompt payment of an annual rent. There is nothing illegal or inconsistent in such estate; and this is the contract that the city of Savannah made with the purchasers of lots from the city.

The construction of the deed according to its express terms corresponds with the actual interpretation by the corporation, and the deed is a perpetual lease and not a fee conditional.

We have been unable to find any case in which a lease creating a tenancy and reserving an adequate annual rent with right of re-entry on the non-payment of rent or non-performance of other conditions has been adjudged void on account of being *perpetual in its duration.*

White *vs.* Fuller, 38 Vt., 206.

The town of Carondelet ordered a sale of its common, the purchaser to pay 2 per cent. on the amount bid as annual rent for ninety-nine years and 4 per cent. forever afterwards, with clause of forfeiture and re-entry for non-payment both in the ordinance and conveyance. The court held the conveyance to be a lease, and that the forfeiture for non-payment of rent was complete, Leonard, J., dissenting as to the effects of the forfeiture and coinciding with the supreme court of Georgia in Laurence *vs.* Mayor, etc., as to the equity of the lessee.

Taylor *vs.* Carondelet, 22 Mo., 105, 106, 112.

The city had full authority to let, lease, or rent any lot or lots of land. There is no restriction on this power, and the corporation has determined that a perpetual lease at an annual ground rent of a certain per cent. on a valuation which itself fixed on the property would be advantageous to the corporation, and there being no legal restriction on the power, the contract becomes binding on it. If there had been any want of authority, the contract made by the corporation was legally confirmed and made valid to all intents and purposes, according to the covenants, limitations, and agreements of the same, whether the conveyances were in fee-simple or otherwise.

Act of December 21, 1822, Dawson's Compilations, p. 443. See Record, p. 31.

But it is unnecessary to cite any confirmation of the conveyance. The corporation continues to collect the ground rent and to claim the enforcement of all the covenants and conditions in the instrument, and its force and legality is not questioned or denied.

The only payment required to be made to the city and the only condition for the perpetual use and enjoyment of the property as against any interference by the city is the payment of the ground rent. (See the contract.)

In the case of Laurence *vs.* The Mayor, etc., Savannah, the relations of the city and the lot-holder are thus stated by the court:

"In this case the city, by the resale of the lot, gets not only the amount then due, but also secures its future rents; it gets all that it ever contracted for, and by returning to the original *lessee* what is over and above the amount due at the

time of the resale, he gets nothing more than he was entitled to under the contracts."

Laurence *et al. vs.* Mayor, etc., Savannah, 71 Ga., p. 399.

The conveyance is construed as a lease and not as a conditional fee; for the court further says:

"The right to redeem and continue the lease, even after forfeiture and re-entry, exists whenever the lessee will pay what is due, and if the lessor refuse to receive it when tendered, the amount will be ordered paid into court and he will be enjoined from ousting the tenant."

See also the further remarks of the court.

Laurence *et al. vs.* Mayor, etc., Savannah, 71 Ga., 398, 399.

The consideration of the contract was not the amount of money fixed by the city as the price of the lot, but the increase money bid at the sale and the ground rent reserved, which was fixed before the sale. The covenant of the purchaser was not to pay the purchase-money due at any time whatsoever, but only to pay an annual ground rent quarterly.

The covenant of the city was not a warranty of title, but a covenant for quiet enjoyment in the precise terms used between landlord and tenant, with the usual right of re-entry and power to terminate the estate in case of default in the payment of the ground rent.

As further confirmation that the conveyance was intended to be a lease, the ordinance of April 7, 1806, subjecting ground-rent lots to taxation, afterwards amended, described them as "lots held under *lease* from the corporation." These lots are described as "held under lease" in the ordinances of December 14, 1807; January 7, 1809; March 11, 1825; August 27, 1839; January 4, 1811; January 3, 1812; July 3, 1828;

November 11, 1842. In the resolution of council passed April 8, 1806, the recorder was directed that in those cases where bonds (required by the ordinance of September 28, 1790) have not been executed the proper suit be commenced on the covenant contained in the *leases*, referring to the holders of ground-rent lots (Record, pp. 49 and 50).

Now, then, being a lease, the tenant pays to the landlord only the redendum actually reserved and no more.

The ordinance providing for the disposal of these lots at a fixed ground rent to purchasers at public sale and the conveyance to the purchaser reserved no other consideration than the annual ground rent, payable quarterly, and no other right or power to the mayor and aldermen save that of receiving said ground rent, and of re-entry in the event of default in the payment of the ground rent; and the conveyance contained an express covenant that the purchaser, his heirs, executors, administrators, and assigns, should peaceably and quietly hold the premises without let, suit, trouble, eviction, or denial, and so long as the purchaser paid the rent he could not be disturbed by the city in his possession and enjoyment of the lot.

In making the contract with the purchaser to convey the lot to him in consideration of a certain annual rent, the city retaining the absolute title, the city did not stipulate for any increase of the rent or the imposition of any other charges on the lot than the rent. It could not, so long as the contract remained of force, ask any other charge to the holder.

The lots are subject to the payment of ground rent to the city and "only such assessments and burdens as shall be in common with other lot-holders." These assessments and

burdens refer to the State and county taxes and local assessments for street improvements and sidewalks. The covenant was not to pay the city anything more than the rent, and this the city was to receive net. Whatever assessments and burdens that might be chargeable to other lot-holders, these and these only were to be borne by the holder of the lots held under lease (Record, pp. 20, 32).

When these lots should be subject to taxation by the State, the tax was not to be paid by the city, nor if paid by the holder to be deducted from the rent. If assessments were to be levied for street improvements or sidewalks to be laid, they were not to be chargeable to the city, but were to be assumed by the lot-holder.

The fact that the deed should contain a covenant of that nature demonstrates the truth of the conclusion that the holder of these lots did not take a fee, either conditional or absolute.

The owner of the fee is liable for all taxes. The grantor when he conveys an estate in fee is no longer liable for subsequent assessments and burdens on the property. He requires no covenant and makes no saving clause that the grantee shall assume and pay these burdens, but the landlord is liable for all taxes, assessments, and burdens of a public character that are not in the contract assumed by the tenant.

The law imposes the obligation on the landlord, when the lease is silent on the subject, to pay all State, city, and county taxes and assessments.

Taylor's Landlord and Tenant, 4th ed., § 341.

Wood's Landlord & Tenant, p. 683, sec. 417.

The phrase "Subject only to" is not in the Ordinance of Sept 28 1790 which controls and the insertion of these words in the deed binds only to the extent actually acted on + as construed by the parties
Levine v Marshall 20 How 588 666. 667
McGanahan v Manning Co 98 U.S 316. 324
U.S. v Iron Silver Mining Co 128 U.S 673. 680

A municipal corporation may hold property, not for governmental purposes, but for mere convenience of its people, or as source of profit to itself, or to supply a need which is commonly supplied by a private corporation. Such property is deemed to be held by the corporation in its social or commercial capacity as a private corporation and for its own profit, and such property is not presumptively excluded from taxation by the State.

Cooley on Taxation, pp. 173, 174.

2 Dillon on Municipal Corporations, sec. 773, 774 and note.

City of Louisville *vs.* State, 1 Duvall (Ky.), 295; 85 Am. Dec., 624.

The right of the State to tax the city domain of the city of Savannah was recognized by the passage of the act of February 18, 1856, to exempt the city of Savannah from taxation of the Springfield plantation.

Acts 1855–'56, p. 546.

In a lease that might be perpetual in its term, with a liability to taxation by the State, the city required the covenant from the lessee that he should hold the premises subject to such assessments and burdens only as should be common to other lot-holders, and the admitted facts show that the holder has always assumed and met such assessments and burdens. The construction actually placed on this covenant and the manner in which it has been performed for nearly one hundred years are binding on the present city council; the rights that had been acquired under this construction are as absolutely protected from impair-

An Act to exempt the City of Savannah from taxation upon certain property known as the Springfield Plantation.

Approved February 18th, 1856.

Section I. Be it Enacted, &c., That from and after the passage of this Act, the City of Savannah shall be exempt from taxation upon certain property known as the Springfield Plantation, now embraced within the corporate limits of said city.

Section II. (Repeals conflicting laws.)

ment as any other of the terms and covenants of the lease. The city council could, with as much right and propriety, increase the rent or diminish the term of time or compel the payment of the valuation money and force the holder to accept a fee-simple title.

The contract definitely fixed the amount that was to be paid to secure the rights to the use and occupation of the lot, and to receive and take the rents, issues, and profits thereof, and expressly excluded the right to increase that amount by taxation by declaring that the lot-owner should be subject *only* to such assessments and burdens as were common to other lot-holders (Record, p. 20).

The covenant of quiet enjoyment was expressly conditioned on the payment of ground rent at the time and after the manner prescribed in the contract. The payment of the ground rent was the extent of the city's demand on the purchaser. It could never demand the payment of the valuation money, and it was never, as owner of the lot, to be liable for any assessments or burdens that might be imposed on lot-holders, as the purchaser or lessee by express contract had assumed that burden.

The municipal corporation, retaining the absolute ownership of the lot, might as such owner be liable for any assessments or burdens that might be common to lot-holders, and to relieve itself of such liability by the express terms of the contract the renter covenanted to be subject to such assessments and burdens, and the evidence shows that the municipal authorities have never been called on to bear such burdens, but all taxes levied by the State and all assessments and burdens for sidewalks, street improvements, etc., have always been paid by the tenant, in common with other lot-holders.

All that the city reserved to be paid it was the specified ground rent and no more.

The State of Georgia, by the act of the General Assembly approved October 24, 1870, proposed to lease the Western and Atlantic railroad at a rent not less than $25,000. The act guaranteed the company should in no case be disturbed by the authority of the State so long as they keep the contract on their part and make the payment when due. The contract did not reserve the right of the State to tax the company.

On February 28, 1874, the legislature passed an act requiring the "president of all railroad companies to return on oath to the comptroller general the value of the property of their respective companies to be taxed as other property." Notwithstanding the power of the legislature to modify the chartered rights of corporations created since the adoption of the Code, the court say that the act guaranteed that the company should "in no case be disturbed by the authority of the State so long as they keep the contract on their part and make the payments when due." Therefore "the right does not exist by the leasing act in one party to revoke a highly important stipulation in the contract and at the same time to demand that the other shall abide by and perform all the others."

Western & Atlantic R. R. *vs.* Comptroller General, 54 Ga., 429–434.

In the case of the contract of lease of the Western and Atlantic railroad, the contract expressly provided that the company should pay to the State the same tax that the Central railroad did; otherwise under the guarantee of quiet

enjoyment nothing but the rent reserved could have been required.

The only payment required to be made to the city and the only condition for the perpetual use and enjoyment of the property as against any interference by the city is the payment of the ground rent. (See the contract.)

The city reserved no other right or power. There were no taxes due or payable to the city at the time the purchaser went into possession of the lot under the ground-rent contract, and the right of the city to increase the rent by adding a tax on the leasehold interest was not reserved. "What is not expressed does not exist."

The city did not expressly declare that "city lots" should be exempt from city taxes, because under its contract it did not dispose of the lots in fee, but only conveyed the use and occupation for the consideration of an annual ground rent and other covenants in the deed mentioned. It expressed all that it would require of the purchaser, and the purchaser was liable to pay what the contract declared to be the consideration for this use and occupation.

In the case of Murray *vs.* The City of Charleston, the city of Charleston had not expressly stipulated that it would never tax its own bonds, and yet, when subsequent to the sale thereof it levied a tax upon them, the Supreme Court of the United States held that the tax impaired the obligation of the contract to pay the stipulated interest.

Murray *vs.* Charleston, 96 U. S., 432.

The obligation imposed by the contract entered into between the city and the ground-renters is to pay to the city annually, in four quarterly payments, the rent reserved to

be paid. The valuation money was never demandable nor collectible, nor was there any obligation to pay it.

The obligation assumed by the city to the ground-renter was that so long as the rent was regularly paid in the manner prescribed it would secure to the holder of the lot the right at all times peaceably and quietly to have, hold, use, occupy, and enjoy the lot and premises, take the rents, issues, and profits thereof, without let, suit, trouble, eviction, or denial of the municipal corporation or any one claiming or acting under it.

The corporation itself, in the sales at public outcry of new lots laid out from the common, through its marshal, in the presence of a committee of council, and at the direct and specific instruction and direction of said committee, announces to the purchasers its interpretation of the contract and declares that the lots are to be disposed of on specific ground rent, payable to the city, and, so long as the lots are held under the contract to pay ground rent, they are not to be subject to city taxes. The testimony of Alderman Nichols and ex-Alderman Wylly and others is explicit as to these facts, and they are not rebutted nor denied.

The defendant denies that the city could be bound by the announcement, made at the sales of these lots, that the same while held on ground rent would be free from city taxes. We insist that these announcements were in fact only the reiteration of the interpretation given to the contract by the city in its ordinances and previous declarations. But the city could be bound by the terms of sale so announced.

Mayor, etc., Macon *vs.* Franklin, 12 Ga., 253.

A municipal corporation may be estopped by the action of

its proper officer when the corporation is acting in its private, as contradistinguished from its governmental, capacity and has lawful power to do the act.

Chicago *vs.* Sexton, 115 Ill., 230.

Dillon Mun. Corp., p. 322, note.

A State, when it enters into a contract with its citizens, can claim no exemption from the rules of law applicable to contracts between individuals, and all acts which relate to the contract—declarations of agents—which in the case of a citizen would affect the contract must be held as in like manner affecting a contract made by the State.

Patten *vs.* Gilmer, 42 Ala., 548.

City lots were required to be sold in presence of a committee on public sales and city lots, and this committee is presumed to have been present, the presumption being that public officers do their duty.

City Council of Augusta *vs.* Pearce, 79 Georgia R., p. 100, and authorities there cited.

A municipal corporation may so deal with third persons as to justify them in assuming the existence of an authority in another, which in fact it has never given.

1 Dillon Municipal Corp., sec. 452, note 2.

Davis *vs.* New York, 93 N. Y., pp. 250–253.

A municipal corporation may hold property, not for governmental purposes, but for mere convenience of its people or as a source of profit to itself or to supply a need which is commonly supplied by a private corporation. Such property is deemed to be held by the corporation in its social or

commercial capacity as a private corporation and for its own profit.

In making the sale or lease of these lots the city of Savannah was acting within its private or proprietary powers as distinguished from its governmental or legislative powers.

1 Dillon on Municipal Corporations, sec. 66 *et seq.*

1 Dillon on Municipal Corporations, 116, note 2.

Ratification by the city of unauthorized acts of its officers in the scope of the corporate powers is valid and binding, and the ratification may frequently be inferred from acquiescence after knowledge of all the material facts or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals.

1 Dillon on Municipal Corporations, sec. 463.

Dillon on Municipal Corporations, p. 322, note.

St. Louis *vs.* Armstrong, 56 Mo., 298.

Chicago *vs.* Sexton, 115 Ill., 230.

Let us see how the contract was regarded by the mayor and aldermen from 1791 to 1876, at least, the latter being the date of the last direct declaration on the subject from the corporation.

It is admitted that no city taxes have ever been claimed or assessed on the lots known as "city lots" or ground-rent lots (Record, p. 51) from the year 1791 to the year 1878 (when the ordinance now resisted was passed), but it is suggestive and important to trace the course of city legislation on this subject and the municipal interpretation of the contract regarding the taxation of these city lots.

The city treasurers' reports in the minutes of council show that there were no taxes levied on real estate in Savannah by the municipal corporation from 1791 to 1807. On April 7, 1806, under the authority of the act of the General Assembly passed December 2, 1805, the mayor and aldermen passed an ordinance whereby a tax was assessed and levied on all houses, lots, etc., improved or unimproved, and including "all lots held by lease from the corporation." Soon, however, after the passage of the ordinance the liability of these lots to city taxation was questioned, for it appears from the minutes of counsel that on the 10th day of May, 1806, a committee was appointed to report necessary amendments to the ordinance, and leave was granted to bring in a bill to amend it. (See Record, p. 49.) Again, on August 25, 1806, a committee was appointed to revise the ordinance and to report by bill such amendment as "they deem *necessary* and *proper*." The committee reported on September 8, 1806, recommending an amendment which struck out "lots held under lease from the corporation," and the minutes of council reported in the evidence show that the matter was carefully debated, and on November 24, 1806, the amended ordinance was passed. The amendment was in terms that "so much of section 1 of the ordinance of April 7, 1806, as taxes lots held by lease from the corporation be stricken" (Record, p. 50).

The tax ordinance to raise funds for current expenses thereafter were modeled on the ordinance of November 24, 1806, and each tax ordinance successively passed from November 24, 1806, to the ordinance of January 11, 1857, inclusive, excepted from taxation "lots held under lease from the corporation."

And it is to be noticed that the express exception of "city

lots" does not occur in the tax ordinances from 1857 to 1874. The phrase used is "real estate" or "real property;" but it is admitted that no taxes were assessed or levied on "city lots" under any of these ordinances, and the explanation is to be found in the tax ordinance of December 11, 1857, where the phrase "real property" is construed to "include land and buildings and fixtures erected on land whether the land be or be not itself subject to taxation;" and in compliance with this definition of taxable real property the tax ordinances passed in the years 1866 to 1874 use the following expression:

"Taxes shall be assessed, levied and raised at and after the following rates, that is to say: 1. At the rate of — per cent. per annum on real estate in said city according to the valuation of the year" (Record, p. 50).

And in the years 1874, 1875, and 1876 the assessment was as follows:

"Every person holding real property in said city including improvements on lots subject to ground-rent shall pay a tax of — per cent. on the value of such property."

The report of Hon. John Screven, one of the most learned and intelligent citizens, who had been many times mayor and who was conversant with the history of city lots and familiar with the contract and the construction given to it, is as clear as the testimony of ex-Alderman Nichols and ex-Alderman Wylly and others. He says in his annual report for the year 1871, page 5: "It is not known to the foreign public that a very large part of the real estate in the city consists of lots sold on condition of the payment of ground rent, and is

therefore not the subject of taxation and is not included in" the statement of taxable property in the city assessed for taxation (Record, p. 51).

The report of William Hunter, chairman of the finance committee, contains the following statement:

"The reason why city lots are not taxed beyond the ground rent is that the city is understood to have bound itself not to tax them" (Record, p. 56). "The ordinance of 1799, which was the first to provide for the sale of lots on these terms, contains a stipulation that the purchaser of such lot and all claiming under him shall have the use, etc., upon paying the ground rent. This ordinance has been followed either in terms or substance by all succeeding ordinances providing for such sale.

"It is of no moment that the stipulation does not appear in the deeds. The ordinances contain the real terms of the contracts and control the deeds whenever the latter depart from or conflict with them; and, as the city has never taxed such lots, it is difficult to resist the conclusion that such was the design when the ordinance of 1790 was framed."

See Record, p. 56.

The evidence also conclusively and affirmatively shows that those lots held under lease from the corporation were announced to be free from city taxes so long as they remained ground-rent lots at the time they were exposed for sale, the announcement being made by the city marshal under the authority of a committee of council superintending the sale.

The evidence further shows that in all the years of financial stress and difficulty, when every source of taxation was canvassed and every species of property and business were subjected to taxation, these lots were not taxed, sustaining

the contention that it was not an attempt to create an exemption from taxation nor a gratuity, but was a binding and valid contract, retaining the title in the city, whose obligation could not be violated. The rate of taxation upon taxable property was from time to time increased, new licenses were required, and the subjects of taxation were increased, but, however great the stress for money, no attempt was made to tax these leasehold lots. The reason for excepting "lots held by lease," or "city lots," as these lots were called, is not expressed in the minutes of council or in the ordinances, but the conclusion is irresistible that the contract being construed as a lease and the city having reserved a stipulated rent and having entered into an express covenant of quiet enjoyment on the single condition of a faithful payment of the rent, it could not assess a tax on the lots held by lease, and they were therefore clearly not subject to taxation, the city thereby declaring its understanding of the contract and its purpose in good faith of carrying it out. The power of municipal corporations to make exemptions, while denied by some authorities, was, prior to the constitution of 1877, admitted to exist in Georgia.

Mayor of Athens *vs.* Long, 54 Ga., 330.
Waring *vs.* Savannah, 60 Ga., 93.
Atlanta Street Railroad *vs.* Atlanta, 66 Ga., 104.

The sales and leases of the town common and the contract made by the city was confirmed by the General Assembly, and the language of the act is peculiar: "The mayor and aldermen to the great advantage of the lot-holders and with much profit to the city treasury having alienated granted and conveyed certain parts of the common and justice re-

quiring that the agreements made by the corporation with the purchasers be confirmed. The conveyances whether in fee-simple or *otherwise*, were legalized and made valid according to the covenants limitations and agreements" (Record, p. 31, acts Dec. 21, 1823); and the corporation was further empowered to sell and dispose of any part of the property, domain, lands, or lots by *lease* or fee-simple (Record, p. 31, acts Dec. 24, 1825).

If there could have been any question as to the power of the city to make the contract, this question has been settled and the objection removed by the act of the General Assembly approved December 21, 1823 (Dawson's Compilation, p. 443).

This act confirmed, legalized, and made valid, to all intents and purposes, all conveyances heretofore made of the town common, whether in fee-simple or otherwise, according to the covenants, limitations, and agreements of the same.

The municipal corporation of Savannah was further invested with power to sell and dispose of all or any part of the property, domain, land, or lots to the said corporation belonging or appertaining by lease for years or in fee-simple as to said mayor and aldermen or a majority of them shall seem meet and proper (act approved Dec. 24, 1825, P. A.; Dawson's Compilation, p. 465).

The General Assembly by subsequent act may validate and confirm previous acts of the corporation otherwise invalid. If the act could have been lawfully performed or

done under *precedent* legislative authority, the legislature may subsequently ratify it and give it effect.

1 Dillon Municipal Corporations, sec. 79, 544.

Bass *vs.* Columbus, 30 Ga., 845.

Winn *vs.* City of Macon, 21st Ga., 275.

Danielly *vs.* Cabanniss, 52 Ga., 212–224.

Wilkerson *vs.* Lehland, 2 Peters, 662.

The right of the State to make a valid contract to exempt from taxation, which comes under the protection of the Constitution of the United States, is now established beyond question.

Salt Co. *vs.* East Saginaw, 13 Wall., 376, and authorities cited in note.

Central Railroad and South Western R. R. *vs.* State, 92 U. S., 665.

Western & Atlantic R. R. *vs.* State, 54 Ga., 428–431.

Cooley on Taxation, pp. 66–68.

Exemption from taxation for a consideration is binding, and is a contract that cannot be impaired, but is protected by the Constitution.

Cooley on Taxation, pp. 66, 68.

Cooley on Constitutional Limitations, 5th ed., pp. 150 *et seq.*, 340, note 2.

New Jersey *vs.* Wilson, 7 Cranch, 164.

Salt Co. *vs.* East Saginaw, 13 Wall., 376.

Central R. R. & S. W. R. R. *vs.* State of Georgia, 92 U. S., 665.

Western & Atlantic R. R. *vs.* State of Georgia, 54 Ga., 428–431.

And in regard to exemptions arising from contracts Mr. Cooley, in his Treatise on Taxation, states, in note four, page 200:

"It seems that a city may make an exemption from taxation a part of the consideration for a water company supplying it with water."

Grant *vs.* Davenport, 36 Iowa, p. 393.
Cooley on Taxation, p. 201; note.

An exemption from taxation made on the basis of a contract in which the public is supposed to have received a full equivalent is admissible.

Cooley on Taxation, p. 214.

An exemption from taxation for a consideration is binding and is a contract which cannot be impaired, but is protected by the Constitution.

Cooley on Constitutional Limitations, p. 340.

The contract was beneficial to the city. In the first place, the city rented the lots on its own terms. It fixed the rental in advance at such amount as it deemed a fair compensation. The purchaser, induced by the advantages offered by the city, paid in many instances a large increase on the valuation in cash. The exhibit to the bill shows that this increase in some cases exceeded the original valuation placed on the lot by the city (Record, p. 47).

The exemption from city taxes was not a gratuity or privilege, but entered into the consideration when the lots were originally disposed of, and does not rest upon the idea of exempting property which is or would otherwise be subject,

but rests upon the fundamental idea that it was not the property of the lessee.

There were no restrictions on the power of the city to make such a contract of lease as to property which it had the right to control (Record, p. 47).

The city received the full benefit of this arrangement in the acceptance of the rents fixed by itself without diminution or reduction, and the payment in most instances of a large bonus or increase. The citizens have been induced to purchase from the city and from its assigns these lots at prices controlled by the *advantages* of fixed charges, as rent, instead of fluctuating charges, as annual taxation; and all the principles of estoppel apply to prohibit the city from levying a tax in addition to the ground rent.

1 Dillon Municipal Corporations, sec. 452, note 2.
Davis *vs.* New York, 93 N. Y., 250–253.
Moran *vs.* Miami Co., 2 Black (U. S.), 722.
13 Wall., 298–305, Pendleton *vs.* Amy.
Randolph *vs.* Post, 93 U. S., 502.

That the exemption of "city lots" from taxation was not a matter of gratuity, but was due to the construction of the contract made by the city with the holder, which shows that the city and not the lessee was the owner, is further shown in the records of the city in the statement of the city domain. The common had been gradually encroached upon, the plan of the city extended over it, and the same made off in lots, until in 1854 there were six hundred and forty-three lots in 22 wards held under lease, many of them improved (Record, p. 42), yet in giving the value of taxable real estate in the city the statement is made that city lots or lots under lease, not being

liable to city taxation, are not included in the comparative statement, and the 643 lots in 22 wards under lease are claimed to be part of the city domain, having a distinct valuation as part of the city resources and yielding a revenue in the rents derived from the same, while real estate held in fee-simple and the improvements on these lots or lots under lease are alone mentioned as the taxable real estate. The reason is plain: the ground-rent lots are the property of the city.

The city of Mobile transferred certain water works to Stein for 20 years, and covenanted that so long as he kept his covenant he should retain quiet possession, without let or hindrance of said city. The city could not require the payment of a license or tax for carrying on the business.

Stein *vs.* Mayor, etc., Mobile, 49 Ala., 362–369.

The city wished to build a sewer through defendant's lot. It was necessary to condemn or get his permission. He consented on condition that he could have three years in which to pay his proportion of the costs of the sewer, to which the city authorities agreed without any express authority. The sewer was built, and before three years had expired the city sued defendant for his proportion of the costs of the sewer. Held, that the action was prematurely brought. The city by using defendant's land under the agreement of the officers was bound by that agreement.

St. Louis *vs.* Armstrong, 56 Mo., 298.

A municipal corporation may bind itself by and cannot abrogate any contract which it has a right to make under its charter (or which has been ratified and confirmed by the

legislature), but one council cannot bind itself or others to a given line of policy.

Williams *vs.* City Council of West Point, 68 Ga., 816.

The city is estopped by the terms announced at its sales. When it enters into a contract with its citizens it is not exempt from the rules of law applicable to contracts between individuals, and all acts, declarations, and admissions of its agents which relate to the contract and which, in the case of a citizen, would affect the contract, must be held as affecting a contract made by it.

Mayor of Macon *vs.* Franklin, 12 Ga., 253.
Chicago *vs.* Sexton, 115 Ill., 230.
2 Dillon, Municipal Corporations, p. 322 (note).
Patten *vs.* Gilmer, 43 Ala., 548.
Barclay *vs.* Howell's Lessees, 6 Peters, 498.

The covenant of quiet enjoyment on the payment of the rent debarred the city from adding any terms whereby the use and enjoyment of the tenant could be restricted or forfeited.

Stein *vs.* Mobile, 49 Ala., 362–369.
St. Louis *vs.* Armstrong, 56 Mo., 298.
W. & A. R. R. *vs.* Comp. Gen., 54 Ga., 429–434.

The municipality having asserted its ownership of the said ground-rent lots by official entries on its minutes in its official reports, and the publication of this claim openly, continuously, and notoriously until it determined not to dispose of any more of its domain on lease at ground rent, it is estopped now from disclaiming the title and ownership

for the purpose of imposing a tax on its tenants as the owners while claiming the rent from them as lessees (Record, pp. 40 and 41).

A city cannot pass by-laws or ordinances which impair the obligation of contracts.

Stein *vs.* Mobile, 49 Ala., 369.
Cooley on Constitutional Limitations, m. p. 368.
1 Dillon, Municipal Corporations, sec. 450, n. 3.

The inhibition of the Constitution against the impairing of the obligation of a contract applies as well to city ordinances as to the State laws.

Home Ins. Co. *vs.* City of Augusta, 93 U. S., 116–121.
Murray *vs.* Charleston, 96 U. S., 432–440.
N. O. Water Works *vs.* La. Sugar Co., 125 U. S., 18–31.
Stein *vs.* Mayor, etc., Mobile, 49 Ala., 369.
1 Dill. Mun. Corp., sec. 450, n. 3.
Winter *vs.* Jones, 10 Ga., 196.

It is claimed that the State constitution of 1877 required the imposition of this tax. The answer is that the State constitution could not impair the obligation of the contract or validate such impairment.

Railroad Co. *vs.* McClure, 10 Wall., 515.
County of Moultrie *vs.* Savings Bank, 92 U. S., 631, 4th head note.
New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650.

Tax levied on the leased lots is a tax on the city's own

property, which it certainly cannot impose for obvious reasons.

Galveston Wharf Co. *vs.* Galveston, 63 Tex., 14–24.
Stein *vs.* Mobile, 54 Ala., 27.

A contract entered into between parties, valid at the time by the laws of the State, no decision of the courts of the State subsequently made can impair its obligation.

Chicago *vs.* Sheldon, 9 Wall., 50.

The subsequent imposition of a tax by the municipal corporation on the lot so leased in addition to the rent reserved was in fact an increase of the amount to be annually paid for the use of said lot and was a violation of the obligations of the contract.

All that the city provided for in the matter of taxes was that as owner it should not have to bear any assessment or burden that might be common to lot-holders, but that the renter should bear these burdens and thereby secure to the city the full rent reserved.

An imposition of a tax by the city on the holders of these lots was a payment in addition to this rent and was a violation of the contract by increasing the annual payments to be made to the city beyond the amount specified in the contract.

Where a municipal corporation issued bonds paying a certain interest it could not impose any tax on such bonds. The tax necessarily diminished the interest and violated the contract.

Murray *vs.* City of Charleston, 96 U. S., 432.

The construction placed on the contract by the city, that the lots were held under lease and were not subject to taxation, as shown by the evidence and acted on so long as it continued to make such contracts, is binding on the parties and it is not within the power of the city to change this construction after it had ceased to make contracts of this character so as to bind the other parties to the contract.

It is claimed, however, that the estate of the holder of a "ground rent" or "city lot" is not a "leasehold estate," notwithstanding the declarations to that effect and the construc tion placed upon the conveyance by the municipal authorities, and the case of Gibbons *vs.* Gibbons, T. U. P. Charlton's (Ga.) Reports, page 113, is cited to sustain this contention. The case arose from the refusal of a lot-holder to pay State taxes on a "city lot."

While the argument of the attorney general of the State, Mr. Charlton, is a contention that the estate of the holder of a city lot is a fee to be defeated by the non-performance of a condition subsequent and is taxable to the holder, yet the judgment is simply that the lot is taxable by the State in the hands of the holder.

Mr. Charlton argues from a false premise. He contends that the deed conveys an estate to the grantee, his "heirs and assigns" forever. This is absolutely incorrect. The deed recites that the purchaser has "made election for the present of retaining the purchase-money in his own hands and paying a ground rent for the use and occupation of said lot," and "bargains and sells" the lot of land, with the rights, members, and appurtenances thereof; to have and to hold said lot, with all and singular the *advantages* thereunto be-

longing, unto the purchaser, his executors, administrators, and assigns forever."

It is true the purchaser covenants for himself, his heirs and assigns, to pay the rent, but so does every lessee in a well-drawn lease—*e. g.*, the leases of the "Springfield lots." The fee in the lots is retained by the municipal authorities clearly and distinctly. We therefore contend that the case of Gibbons *vs.* Gibbons simply decided that these lots were subject to State taxation. This is not denied; but the reasoning of counsel in that case, whereby the estate of the holder is claimed to be a conditional fee, is denied to be correct. The conveyance does not convey the lot to the purchaser, "his heirs and assigns forever," but to the holder, his "executors, administrators, and assigns forever."

The conveyance expressly reserves the fee in the city until the valuation money shall be paid. It expressly conveys to the holder only the "use and occupation." As had already been shown, the estate conveyed and the covenants and conditions contained in the conveyance comport only with a perpetual lease and not an estate in fee. The decision is not binding on the parties to this suit and is not *res adjudicata*, and does not effectually determine the nature of the estate between the city and the holder, and, being based upon an erroneous statement of the terms of the conveyance, has no force or authority, and is overruled by the current of authorities hereinbefore cited.

As the special covenant in the conveyance was sufficient to sustain the judgment of the court that the lots were subject to taxation by the State, the fallacious argument of the attorney general has no binding force on this court, and never did work estoppel to the city or the holders of the lots

to deny that the estate in the holder was a fee, or that the corporation had ever parted with the fee.

The holders of the "city lots" or "lots held under lease" were liable to the taxes assessed by the State, not because their estate in said lots was a fee, but because *by their contract* they had covenanted to pay these taxes. The argument of Mr. Charlton, reported by himself, as to the estate created by the ordinance and conveyance, was as unnecessary as it was fallacious, and he concludes his argument by the statement that if the estate is not a freehold of inheritance, "the form of the corporation grant subjects the lots to taxation by the State."

The construction of the words of the deed in Gibbons *vs.* Gibbons, above cited, has not the weight of authority; and the case is also overruled, so far as it holds that the conveyance cannot be a lease because it may last forever, by the recent decision of the supreme court of Georgia in the case of Atkinson *vs.* Orr, in 83 Ga., 37, and the decision in Laurence *vs.* The Mayor, etc., Savannah, 71 Ga., 398, 399, already quoted in this brief.

"Exemption, to be admissible," says Mr. Cooley, "ought to be made on the basis of contract, in which case the public is supposed to receive a full equivalent therefor, or on some ground of public policy."

In the case of these city lots the public received a full equivalent in the increase money paid for the privilege of holding these lots under ground rent or in paying the high values put on the lot in the first instance.

If the leasehold interest of the plaintiffs in error in the ground-rent lots are subject to taxation as such by the mayor and aldermen, the ordinance under which such tax

is levied is unconstitutional and void, no other leasehold interest in said city being taxed, and under the constitution of the State of Georgia all taxation must be uniform on the same class of subjects.

Art. 7, sec. 2, par. 1, Constitution of Georgia.

"Taxation is a fearful power, but like other legislative powers, in a representative government it has its checks and balances. It is certainly limited as to purposes, and has been generally believed by *local rights immemorially existing and universally recognized.*"

Cooley on Taxation, p. 693.

Respectfully submitted.

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That the case affirmatively contains a federal question see
Walker Power Co v Sheldon RR Co 172 U.S. 485
Bridge Prop v Hoboken 1 Wall 142, 146
Spencer v Merchant 125 U.S. 352
166 U.S. 657